United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF

76-5019

UNITED STATES COURT OF APPEALS SECOND CIRCUIT



In the Matter of INVESTORS FUNDING CORP. OF NEW YORK, IFC COLLATERAL CORP., et al.,

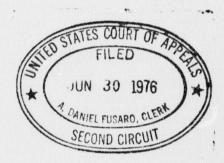
Docket No. 76-5019

Debtors,

JAYTEE-PENNDEL CO.,

Appellant.

APPELLANT'S BRIEF



DENNIS G. KATZ, P.C. attorney for appellant 300 N. Main St. Spring Valley, New York 10977 914-356-2525

Dennis G. Katz, Esq. Of Counsel

UNITED STATES COURT OF APPEALS
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DENNIS G. KATZ, P.C. attorney for appellant 300 N. Main St. Spring Valley, New York 10977 914-3-6-2525

Dennis G. Katz, Esq. Of Counsel

TABLE OF CASES, STATUTES AND AUTHORITIES

<u>Item</u>	page
CASES	
Barton v. Barbour, 104 U.S. 126 (1881)	8
Callaway v. Benton, '336 U.S. 132 (1949)	18
Central Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721 (8th Cir. 1932)	. 19
City of New York v. Patton, 390 F. Supp. 1003 (S.D.N.Y. 1975)	12
Diner's Club Inc. v. Bumb, 421 F.2d 396 (9th Cir. 1970)	, 9, 14
Foust v. Munson S.S. Line, 299 U.S. 77 (1936)	14
Gableman v. Peoria, Decatur & Evansville Ry, Co., 179 U.S. 335 (1900)	••••9
Leonard v. Vrooman, 383 F.2d 556 (9th Cir. 1967)	9, 10
Mercy-Douglas Hospital, Inc. 364 F. Supp. 1066 (E.D.Pa. 1973)	11
Matter of Harry L. Sugerman, Inc., 2 F.2d 436 (2nd Cir. 1924)	20
Matter of Island Park Associates, 77 F.2d 334 (2nd Cir. 1935)	12
Matter of Midtown Contracting Co. 243 F. 56 (2nd Car. 1917)	20
Novo Enzyme Corp. v. Baker, 361 F. Supp. 337 (S.D.N.Y. 1973)	9,12
Reading Co. v. Brown, 391 U.S. 471 (1968)	11,12,13,15

Sherr v. Sierra Trading Corporation, 492 F.2d 971 (10th Cir. 1974)9
Thompson v. Texas Mexican Railway Co., 328 U.S. 134 (1946)
Vass v. Conron Bros. Co., 59 F.2d 969 (2nd Cir. 1932)11.12
Williams v. Austrian, 331 U.S. 642 (1947)
STATUTES
Bankruptcy Act: \$2a(15)
28 U.S.C. §1258,9
28 U.S.C. \$959(a)8
28 U.S.C. §133417
AUTHORITIES
6 Collier, Bankruptcy 78.16[2](14th ed. 1972)9
6 Collier, Bankruptcy 73.13 (14th ed. 1972)14
6A Collier, Bankruptcy 78.16[1] (14th ed. 1972)14
1 J. Moore, Federal Practice 7 0.60[2](1975)
1 J. Moore, Federal Practice 70.60 [86] (1975)18

ISSUES PRESENTED

- 1. Whether a District Court can enjoin the prosecution of a pending state court action against a Reorganization Trustee for his breach of contract committed while carrying on the business of the debtor without any showing that the state court action is interfering with the Chapter X proceedings.
- 2. Whether a District Court presiding over a "Summary Proceeding" in the context of a Chapter X Bankruptcy proceeding has the jurisdiction to render a money judgment against a third party brought into court only to contest the issuance of a permanent injunction restraining a pending state court action against the Trustee.

PREEIMINARY STATEMENT

On June 4, 1975 Jaytee-Penndel Co., the appellant, in the N.Y. state courts commenced a civil action against James Bloor, Reorganization Trustee of IFC Collateral Corporation under Chapter X of the Bankruptcy Act, seeking a declaratory judgment and other equitable relief for a breach of contract committed by the Trustee while administrating the debtor's property. On July 7, 1975, the Trustee submitted an answer to the complaint. After the Trustee refused to submit to an examination before trial dulynoticed for August 4, 1975, Jaytee-Penndel Co. initiated a motion in state court on August 13, 1975 for the purpose of obtaining a default judgment and other relief. On August 14, 1975, the attorney for Jaytee-Penndel Co. was served with a Temporary Restraining Order and Order to Show Cause issued August 13, 1975 by the Hon. Dudley B. Bonsal, United States District Judge, "temporarily" restraining the prosecution of the state court action and requiring Jaytee-Penndel Co. to appear in Federal court to show cause why the restraining order should not be made permanent and why the Trustee should not be authorized to commence a foreclosure action (10). An affidavit in opposition was served on September 14, 1975. After several discussion of settlement before the Court, an unnoticed hearing took place before Judge Bonsal on February 17, 1976 at which time testimony under oath was taken.

^{*} Numbered references are to appendix.

On March 15, 1976 an order was issued by the Hon.

Dudley B. Bonsal permanently restraining Jaytee-Penndel Co. from continuing the prosecution of the aforesaid state court action and requiring Jaytee-Penndel Co. to pay the Trustee \$32,670.69 in money damages and penalties.

It is from this order that Jaytee-Penndel Co. has taken this appeal, which is authorized by 11 U.S.C. \$47, 28 U.S.C. \$1291, and 28 U.S.C. \$1292(a)(1).

STATEMENT OF THE CASE

Prior to its filing of a voluntary petition for Reorganization under Chapter X of the Bankruptcy Act on October 21, 1974. IFC Collateral Corporation ("IFC") was the holder of a "wrap-around" mortgage ("IFC mortgage") on an apartment complex in Pennsylvania owned by the Appellant, Jaytee-Penndel Co. ("Jaytee"). The IFC mortgage is junior and subordinate to a first mortgage held by the Buffalo Savings Bank ("Buffalo mortgage"), the principal balance of which exceeds \$1,000,000. For the purpose of insuring punctual payment of the Buffalo mortgage, the IFC mortgage requires that the owner of the property (ie, Jaytee) make all mortgage payments directly to the holder of the mortgage (ie, IFC), which is under a reciprocal and bilateral obligation to forward the payments due under the Buffalo mortgage to the Buffalo Savings Bank before the appropriate due date. IFC's obligations under the IFC mortgage were assumed by James Bloor, the Trustee in Reorganization, once he succeeded to IFC's interest in the mortgage. Since October 21, 1974, James Bloor ("Trustee") was primarily responsible for managing the vast holdings of IFC and bringing its financial affairs into order.

Unaware of any change in the status of IFC, Jaytee mailed the regular monthly payment to IFC in November 1974 with the expectation that IFC would continue to honor its contractual

obligations. On or about November 11th, Jaytee was notified that IFC had never forwarded the payment and that, therefore, the Buffalo mortgage was in default. Notwithstanding repeated assurances by IFC that the payment was made, Jaytee was repeatedly informed by the agents of the Buffalo Savings Bank that it had never been received; finally, Jaytee received an ultimatum from the Bank that unless the payment was received by the close of business that day, the mortgage would be called, a default would be declared, the unpaid principal balance would be accelerated, and a foreclosure action would be commenced. Needless to say, Jaytee immediately cabled the money (including late charges) to the Buffalo Savings Bank to avoid this catastrophe. A few days later, Jaytee was informed that the Buffalo Savings Bank would no longer accept payments on account of the mortgage from IFC, but would only accept direct payment from Jaytee in the future (6). Jaytee subsequently offered to make two separate payments: one to the Buffalo Savings Bank to satisfy that mortgage, and one to the Trustee to satisfy the IFC mortgage (40). This offer, however, was never accepted by the Trustee.

Once it became apparent that no settlement could be reached with the Trustee concerning his breach of contract, faytee commenced a civil action in the New York State Supreme Court (in the county where its offices were located) seeking a declaratory judgment that (1) the Trustee breached his contract

in November 1974, (2) Jaytee could make separate payments to
the two mortgagees in the future, and (3) the IFC mortgage be
reformed and re-cast in such a way as to (a) provide for a mode
of separate payments and (b) constitute it as a separate and
distinct, second mortgage rather than as a "wrap-around" mortgage.
Two months later, after Jaytee moved to impose sanctions against
the Trustee for failing to appear at a duly noticed examination
before trial, the Trustee served Jaytee's attorney with a
"temporary" Restraining Order against the continuation of the
state court action and an Order to Show Cause seeking a permanent
order (1) enjoining the continuation of the state court action,
(2) authorizing the commencement of a foreclosure action, and
(3) requiring Jaytee to raise in the foreclosure action any
defenses it had thereto.

Defore the federal district court in an attempt to reach a settlement. At the last of these discussions, the attorneys for the Trustee requested that sworn testimony be taken (29) and decided to conduct a formal hearing (29-46). Although the Trustee's attorneys did, in a letter sent to the Court about two weeks prior, state their intentions to make some sort of "evidentiary record" pertaining to the application before the court, Jaytee received either no notice that an informal trial was to take place or that monetary relief was going to be sought in addition to the relief demanded in the application for a permanent order.

Notwithstanding this strategic advantage at the trial, the Trustee was unable to introduce any evidence to show that the pending state court action would, in any way, embarras, impede, burden or otherwise interfere with the administration of IFC's estate in the Federal Bankruptcy Court; nor was there any such finding of fact contained in the final order rendered by the district court. Nevertheless, the court issued a broad-ranging order which went further than the papers before it: (1) enjoining the prosecution of the state court action and (2) requiring Jaytee to pay \$32,670.69 (including late charges and penalties) to the Trustee.

ARGUMENT

I

SINCE THERE IS A PRESUMPTION AGAINST RESTRAINING PROCEEDINGS IN STATE COURTS, A FEDERAL DISTRICT COURT HAS NO JURISDICTION TO ISSUE A PERMANENT INJUNCTION BARRING A SUIT IN A STATE COURT AGAINST A TRUSTEE IN A REORGANIZATION, UNLESS IT IS PROVEN THAT THE STATE COURT ACTION WILL INTERFERE WITH THE REORGANIZATION PROCEEDINGS. IN THE CASE AT BAR, IT WAS NOT EVEN ALLEGED THAT THE STATE COURT ACTION WOULD INTERFERE WITH THE REORGANIZATION, MUCH LESS PROVEN; THEREFORE, THE FEDERAL DISTRICT COURT IMPROPERLY GRANTED A PERMANENT INJUNCTION.

Section 959(a) of Title 28 to the U.S. Code provides as follows:

Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.

This statute was enacted by Congress to overrule the unjust result reached in <u>Barton v. Barbour</u>, 104 U.S. 126 (1881), which denied a litigant the right to sue a receiver for damages (caused by him) in a state court. <u>Diner's Club Inc.</u>, v. <u>Bumb</u>, 421 F.2d 396, 398-9 (9th Cir. 1970). The Congressional policy of 28 U.S.C. \$125, the predecessor to \$959(a), was "to contract the jurisdiction" of the United States courts, which were previously the only forums

before which litigants could seek remedial relief against a receiver appointed by a Federal court.

This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal Court.

Gableman v. Peoria, Decatur & Evansville Ry, Co., 179 U.S. 335, 338 (1900).

The specific inclusion of "Trustees" in the statute was made in 1948 after former 28 U.S.C. \$125 was repealed in favor of the present enactment. The federal policy in protecting persons who deal with a court appointed administrator of a debtor's property by insuring that they not be forced to bear the expense and inconvenience which would otherwise be incurred in litigating a dispute exclusively in the Federal courts, however, continued.

6 Collier, Bankruptcy \(\text{M8.16} \) [2] (14th ed. 1972), at 648. The more recent federal cases have permitted suits against trustees in state courts with respect to contractual claims. Sherr v. Sierra Trading Corporation, 492 F.2d 971 (10th Cir. 1974); Diner's Club Inc. v. Bumb, 421 F.2d 396 (9th Cir. 1970); Leonard v. Vrooman, 383 F.2d 556 (9th Cir. 1967); Novo Enzyme Corp. v. Baker, 361 F. Supp. 337 (S.D.N.Y. 1973).

Thompson v. Texas Mexican Railway Co., 328 U.S. 134 (1946) is a leading case in this regard. There, Texas Mexican Railway had brought suit against the Reorganization trustee for the

Brownsville Railraod in a state court seeking the cancelation of a "trackage agreement" entered into by the debtor railraod prior to the Reorganization. This agreement gave the Brownsville Railraod the right to operate its trains over the tracks of Texas Mexican Railway Co., but further gave either party the right to terminate the "lease" upon 12 months notice. After Brownsville filed for Reorganization, Texas Mexican Railway gave the trustee the required 12 months notice of termination; nevertheless, the trustee continued to operate 1ts trains over the tracks after the 12 month period expired. Texas Mexican brought a suit in state court seeking an injunction and money damages, notwithstanding a general stay issued by the federal court, and eventualyy obtained judgment in its favor. Although the Supreme Court reversed the decision of the Texas Supreme Court on appeal on other grounds, it specifically authorized the state court action on the grounds that (1) the operation of the traims was "plainly a part of the trustee's functions" (328 U.S. at 138) and (2) there was no interferance with the administration of the estate by the state court action:

Cancellation of a contract pursuant to its terms alters, of course, rights and duties of the trustee. But the bankruptcy rule is that he [the trustee] takes the contracts of the debtor subject to their terms and conditions. 328 U.S. at 141.

Accord, Leonard v. Vrooman, 383 F.2d 556 (9th Cir. 1967)(trustee

may be sued in a state court for damages arising out of illegal possession of a building or fraudulent conveyances); Mercy-Dauglas Hospital. Inc., 364 F. Supp. 1066)(E.D.Pa. 1973)(upheld validity of a state court judgment against a bankruptcy trustee).

To be sure, the trustee must be "carrying on business connected with" the property of the debtor before he can be sued for a breach of contract in a state court. Vass v. Conron; Bros. Co., 59 F.2d 969 (2nd Cir. 1932) is the principal case in this circuit upholding the Trustee's position that he was not conducting the business of IFC Collateral Corporation when his breach occurred. "On special facts" Reading Co. v. Brown, 371 U.S. 471, 476 n.6 (1968), a panel of the Second Circuit held that a trustee merely collecting rent for space in a cold storage building (formerly owned by the bankrupt) was not "carrying on business" for the purposes of subjecting him to state court jurisdiction. Two aspects of the case, however, must be emphasized: first, Vass rests on the implicit understanding that the debtor was not engaged in the "rental business;" second, the case did not deal with a Reorganization, but with a regular bankruptcy proceeding.

In a straight bankruptcy, the trustee is charged with the duty of liquidating the debtor's assets for eventual distribution to the creditors; in a Reorganization proceeding, the purpose "is to avoid immediate liquidation of the properties involved. . . with a view to rehabilitate rather than to liquidate."

Matter of Island Park Associates, 77 F.2d 334, 337 (2nd Cir. 1935). In other words, the primary purpose of a Reorganization trustee is the manage the business of the debtor in such a way as to "get it on its feet" and protect creditors. Logically, in order for the trustee to run the business of the debtor more efficiently than the debtor had in the past, the trustee must "carry on" the debtor's business. See, e.g., City of New York v. Patton, 390 F. Supp 1003 (S.D.N.Y. 1975) and Novo Enzyme Corp. v. Baker, 361 F. Supp. 337 (S.D.N.Y. 1973), in which this rationale has been accepted in confract with the decision rendered by the district court below.

Reading Co. v. Brown, 391 U.S. 471 (1968) exemplifies this crucial distinction between regular bankruptcy and reorganization. There, the debtor filed a Chapter X petition and a receiver was appointed to hold and lease an industrial building owned by the debtor. During his administration, the building caught fire and destroyed certain property owned by the Reading Co., which filed a claim in the federal court for "administrative expenses" of the Chapter X arrangement. The Supreme Court held that notwithstanding the Vass case (371 U.S. at 476 n.6), the trustee was "operating the debtor's business" during his administration—even though he merely leased the building on behalf of the creditors. Id. at 475. The Court's holding was founded upon the fact that the debtor was in Reorganization:

Reading Co. sought to characterize this claim as an "administrative expense" in order to give it priority in the event of an eventual bankruptcy.

² and therefore held that any proven negligence of the trustee Would give rise to an "actual and necessary" cost of operating the debtor's business, which would entitle Reading Co. to priority.

When an arrangement is sought, the debtor is insolvent. Its existing creditors hope that by partial or complete postponement of their claims they will, through successful rehabilitation, eventually recover from the debtor either in full or in larger proportion than they would in immediate bankruptcy. Hence the present petitioner did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law. Id. at 478.

The Court went on to hold that since the continued operation of the "business" was for the benefit of the creditors, it is they who must subordinate their claims to the "creditor" of the receiver. Reading Co. thus stands for the proposition that for the purposes of a Reorganization, collecting rent from the debtor's property is sufficient to constitute the "carrying on of a business," and that Vass is no longer good law.

Once it is determined that a Reorganization trustee is "carrying on business" of the debtor at the time a breach of contract occurs, he must rely on the second sentence of section 959(a) if he wishes to restrain a pending state court action against him:

Such actions [against trustees] shall be subject to the general equity power of such court [which appointed the trustee] so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

The trustee, however, must sustain a very heavy burden of proof that the prosecution of the state court action would somehow "embarrass the administration of the estate" before a federal court can issue an injunction. Thompson v. Texas Mexican Ry. Co.,

328 U.S. 134, 140 (1946); Foust v. Munson S.S. Line, 299 U.S. 77, 84 (1936); see generally, 6A Collier, Bankruptcy 7 8.16 [1] (14th ed. 1972), at 60.

Diner's Club Inc. v. Bumb, 421 F.2d 396 (9th Cir. 1970) denied a Reorganization trustee's motion to enjoin a state court action initiated by Diner's Club Inc. for breach of contract by the trustee's negligent employment of an untrustworthy employee who circulated 3,000 false credit cards to the damage of Diner's Club. While recognizing the inherent equitable power of a federal court to restrain actions which might embarrass the administration of the estate, the Ninth Circuit nonetheless found that there is a presumption against restraining proceedings in other courts. Id. at 403. Since the trustee in that case failed to show that the prosecution of the state court action would embarrass or interfere withtthe administration of the estate, the court refused an injunction. Id. at 400. This same view (requiring the trustee to make an affirmative showing and bear a significant burden of proof) also finds support with the commentators. 6 Collier, Bankruptcy 73.13 (14th ed. 1972), at 650.

There can be no doubt that the Trustee in the case at bar was "carrying on the business" of IFC Collateral Corporation at the time he breached his contractual obligation to forward the appellant's payments to the holder of the first mortgage.

For example, the Trustee stated in paragraph 4 of his affidavit in support of his motion for a permanent injunction that the business of IFC Collateral Corporation "consists, primarily, of the ownership, operation, management, purchase, sale, and leasing of commercial and residential properties located throughout the United States." As an incident to selling real estate, the Trustee would naturally receive periodic mortgage payments from vendees. Many of these mortgages were "wrap-around" mortgages, which required continual servicing by the debtor or the trusteeservicing which took the form of executory contractual commitments to forward payments entrusted to the wrap-around mortgage holder to senior mortgagees. As exemplified by Reading Co. v. Brown, supra, the mere collecting of mortgage payments would be sufficient to constitute the "carrying on" of business by a Reorganization trustee; surely, the servicing of a wrap-around mortgage constitutes the "carrying on" of business since the trustee is under a personal, contractual, executory obligation to service prior mortgages in addition to collecting mortgage payments. Consequently, the trustee in this case was properly sued under 28 U.S.C. \$959(a) for breach of contract.

Notwithstanding his legal obligation to prove that the pending state court action against him would embarrass, impede, burden or otherwise interfere with the administration of the debtor's estate in the Reorganization court, the Trustee in this

case never even alleged that this was the case. It is not without significance that the court below did not make any findings of fact that the state court action would have this effect; this is not surprising since it is evident that it did not, nor could not since it merely sought to obtain a declaratory judgment and other equitable relief.

It is not being argued that a federal cannot enjoin the continuation of a state court action, but it is being emphasized that a federal court must be held to some objective criteries before it employs a drastic remedy to curtail a right guaranteed by a federal statute, which is underscored by an overriding Congressional policy of protecting persons dealing with receivers appointed by federal courts. Absent proof that the state court action in this case interfered with the orderly administration of the estate of IFC Collateral Corporation, the court below had no right to enjoin the pending action in the New York State court.

A FEDERAL DISTRICT COURT CAN ONLY RENDER A MONEY JUDGMENT AGAINST A THIRD PARTY TO A REORGANIZATION PROCEEDING IN THE CONTEXT OF A PLENARY SUIT. IN THIS CASE, THE TRUSTEE DID NOT COMMENCE A PLENARY SUIT AGAINST THE APPELLANT, BUT MERELY SOUGHT A RESTRAINING ORDER PROHIBITING THE CONTINUATION OF A STATE COURT ACTION AGAINST HIM. CONSEQUENTLY, THE COURT BELOW IMPROPERLY RENDERED A MONEY JUDGMENT AGAINST THE APPELLANT.

The starting point of any discussion of the jurisdiction of a federal court is the understanding that federal courts are limited in their jurisdiction, having only that jurisdiction which Congress confers upon them. If there is no specific statutory grant of jurisdiction, there is a lack of federal jurisdiction—this is why in pleading practice, the party who seeks to invoke the jurisdiction of a federal court must clearly show that the action is within the statute. See generally, 1 J. Moore, Federal Practice 70.60 2 (1975).

In bankruptcy matters, 28 U.S.C. \$1334 provides:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.

This exclusive grant of jurisdiction, however, deals with matters arising out of the administration, liquidation or

reorganization of the bankrupt. Thompson v. Magnolia Petrolium

Co., 309 U.S. 478, 483 (1940). Congress did not give the

bankruptcy court exclusive jurisdiction over all controversies

that in some way affect the debtor's estate. Callaway v. Benton,

336 U.S. 132, 142 (1949).

With regard to controversies between the trustee and third persons, a distinction is usually drawn between summary and plenary jurisdiction. Summary jurisdiction extends over controversies arising in proceedings in bankruptcy, such as claims to property in the possession of the court. In such cases, the court may (1) determine the claims to property, (2) require property to be turned over the bankruptcy court or (3) adjudicate controversies in situations where the Bankruptcy Act specifically confers such jurisdiction. 1 J. Moore, Federal Practice 70.60 [8.-6], at 653. For example, §§ 2a(15) and 1 such 1

Suits by . . . the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under . . . [the Bankruptcy Act] had not been instituted, unless by consent of the defendant . . .

Section 102 of the Bankruptcy Act, of course, makes section 23(b)

inapplicable to Chapter X proceedings. In addition, by making the broad-ranging provisions of Chapters 1 to 7 inclusive applicable to Chapter X proceedings, it has had the effect of enlarging the jurisdiction of federal courts to preside over plenary suits by trustees against third parties. For example, the Supreme Court held in Williams v. Austrian, 331 U.S. 642 (1947) that when specifically authorized by the Reorganization court, a trustee could institute a plenary suit against the past and present officers of the debtor corporation to recover misappropriated corporate assets in the absence of diversity jurisdiction. This is not to say, of course, that the federal court has exclusive jurisdiction over suits between trustees and third parties.

There is an enormous procedural difference between "summary" proceedings and a "plenary" suit:

17.

The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal pleadings. In the former, the necessary parties are cited in by order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had. Central Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721, 731-2 (8th Cir. 1932).

In other words, a plenary suit is the ordinary civil action

with its summons, formal pleadings, full trial, judgment and other attendant formalities. In the Matter of Midtown Contracting Co., 243 F. 56 (2nd Cir. 1917)(pointing out that in a plenary suit, the third party may be accorded his right to a jury trial). One essential aspect of plenary proceedings is the fact that "due hearing" is essential:

Due hearing implies a statement by the party plaintiff and an answer by the person defendant; while the procedure is informal, there must be an issue framed by what are practically pleadings; on those pleadings a trial is based, and at such trial each party is entitled to examine the other, as well as to introduce witnesses. In the Matter of Harry L. Sugarman, Inc., 2 F.2d 436, 437 (2nd Cir. 1924).

In short, plenary suits must occur in accordance with the Federal Rules of Civil Procedure and other standards of fair play.

While the case at bar was brought as a summary proceeding for the purpose of obtaining a restraining order against the continuation of a state court action against the trustee, it was—at the last minute—treated by the court below as a plenary proceeding. Although the trustee could have asked the court for permission to commence a plenary suit, he didn't. He merely asked the court for a permanent injunction. At no time was there any "pleading" before the court in which the trustee asked for

monetary damages. No notice was ever given to the appellant that the Februry 17, 1976 appearance before the district court was to take the form of a formal hearing, at which time witnesses for the purpose of obtaining admined were to be examined under oath by the trustee's attorneys. The appellant was given no opportunity to either prepare for effective cross-examination or bring in witnesses of his own, as suggested by the following exchange between appellant's counsel and the court:

MR. KATZ: With respect to my client's rights, your Honor, I would ask that if you are entertaining such an application, that you give my client an adequate opportunity to oppose---

THE COURT: No, he will settle the order on you, and if you want to submit a counter order with a memorandum as to why you want it, you can submit it. (45).

At all times, counsel for the appellant was under the impression that the only issue before the court was whether or not the trustee would be entitled to an injunction:

MR. KATZ: Your Honor, with all respect, the issue here is the right of the trustee to permanently enjoin my client from exercising a right guaranteed or provided for under federal statutes.

THE COURT: You worry about that.

MR. KATZ: That is what my client has been opposing.

THE COURT: Have you any more questions you would like to ask the witness, incidentally?

It is readily apparant that the court intended to go far beyond the specific application before, and did in fact do so when it

provided for payment (including late charges!) in its final order, without even giving the appellant opportunity to demand a jury trial on the issues.

It is therefore evident that the "due hearing" required was not afforded the appellant; consequently, the district court improperly rendered a money judgment.

CONCLUSION

There was no basis upon which the district court below properly issued its permanent injunction restraining a legitimate state court action commenced against the trustee for breach of contract; in addition, the court far exceeded its jurisdiction in rendering a money judgment against the appellant in the context of a summary proceeding. For the foregoing reasons, the order issued below must be reversed.

Respectfully,

DENNIS G.KATZ, P.C.

300 N Main St.

Spring Valley, NY 10977

914/356-2525

Dennis G. Kayz

TABLE OF CONTENTS

Item	Page
Table of cases, statutes and authorities	1
Statement of the issues presented	1
Statement of the case	2
Argument	8
Conclusion	22
Appendix	23

2 collow sinch

APPENDIX

INDEX TO APPENDIX

	Page
Relevant Docket Entries	1
State Court Action commenced by Jaytee-Penndel Company	2
Order to Show Cause and Temporary Restraining Order issued by Hon. Dudley B. Bonsal, U.S.D.J.	10
Order Permanently restraining state court action agasint Trustee by Jaytee- Penndel Company and Providing for	
Payment	13
Notice of Appeal	22
Transcript of Proceedings before Hon. Dudley B. Bonsal, U.S.D.J. on February 17. 1976.	24

RELATED TO: 74 B 1455

TAX I.D. NO. 13-1612672

INVESTORS FUNDING CORPORATION OF

NEW YORK,

HON. DUDLEY B. BONSAL

10/21/74	Filed Petition for proceedings under Chapter X-128 together with Affidavit pursuant to Rule X-4 and Exhibits 1 to 7. Referred to: HON. DUDLEY B. BONSAL.
10/22/74	(1) Filed NOTICE OF APPEARANCE and Demand by SEC, Marvin E. Jacob, Associate Regional Adm.attys. Dated: 10/22/74.
10/23/74	(2) Filed ORDER NO. 1 of consolidation to bear the caption In the Matter of: INVESTORS FUNDING CORPORATION OF NEW YORK and I F C COLLATERAL CORPORATION No. 74 B 1454. JUDGE EDELSTEIN, Dated: 10/23/74.
9/16/75	(383) Filed AFFIDAVIT of Emil Tauber, in opposition to the application of James Bloor, for an order enjoining and staying the commencement or continuation of any suits against the trustee by Jaytee-Penndel. f.
3/16/76	(581) Filed Order #184 Permanently restraining State Court Action against Trustee by Jaytee-Penndel Co. and providing for payment. So Ordered Bonsal, J. dated: 3/15/76
4/13/76	(625) Filed NOTICE OF APPEAL, to the USCA by Jaytee- Fenndel Co., from a final order and judgment by Bonsal, J. dated 3/15/76. m/n. f.

SUPREME COURT STATE OF NEW YORK COUNTY OF ROCKLAND

JAYTEE-PENNDEL COMPANY.

Plaintiff.

-against-

JAMES BLOOR, trustee in the reorganization of IFC COLLATERAL CORPORATION under Chapter X of the Federal Bankruptcy Act and REALTY EQUITIES COUNTRYWIDE, INC.,

Defendants.

Index No.

Plaintiff designates
Rockland
County as the place of
trial

The basis of the venue is plaintiff's place of business

SUMMONS WITH NOTICE

Plaintiff resides at 300 N. Main St. Spring Valley, N.Y.

County of Rockland

To the above named Defendants

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

Dated, May 14, 1975
Defendant's address: 630 Fifth
Ave., NYC,NY: 375 Park Ave.:
NYC, NY respectively

Notice: The object of this action is reformation and recasting of a mortgage; declaratory judgment based on a breach of contract

DENNIS G. KATZ Attorney for Plaintiff Office and Post Office Address 300 N. Main St. Spring Valley, N.Y. 10977

Upon your failure to appear, judgment will be taken against you by default for the relief demanded in the complaint.

SUPREME COURT : STATE OF NEW YORK COUNTY OF ROCKLAND

JAYTEE-PENNDEL COMPANY,

Plaintiff.

VERIFIED COMPLAINT

-against-

Index No.

JAMES BLOOR, trustee in the reorganization of IFC COLLATERAL CORPORATION under Chapter X of the Federal Bankruptcy Act, and REALTY EQUITIES COUNTRYWIDE, INC.,

Defendants.

Plaintiff, as and for its Verified Complaint, respectfully shows to this court and alleges as follows:

- 1. Plaintiff is a New York limited partnership having its principal office c/o Jaytee Equities, 300 N. Main St., Spring Valley, N.Y.
- 2. Upon information and belief, JAMES BLOOR maintains an office at 630 Fifth Ave., New York, N.Y. and was appointed trustee for IFC COLLATERAL CORPORATION pursuant to a proceeding for the reorganization of IFC COLLATERAL CORPORATION (IFC), debtor, under Chapter X of the Federal Bankruptcy Act on November 1, 1974.
- 3. Upon information and belief, Realty Equities
 Countrywide, Inc. is a New York corporation having its
 principal place of business at 375 Park Ave., New York, N.Y.
- 4. On or about the 30th day of April 1974 the plaintiff purchased the Pennledge Apartments, located at 255

- E. Lincoln Highway, Penndel (Bucks County), Pennsylvania, and continues to be such owner thereof in fee simple up to the present time.
- 5. On or about the 30th day of April 1974 and continuing up to the present time, the Pennledge Apartments is subject to a certain mortgage dated the 29th day of June 1972 between Pennledge Apartment Corp. as mortgagor, and Realty Equities Countrywide, Inc., as mortgagee, in the original amount of \$1,543.097.81 (hereinafter referred to as the "IFC Mortgage"), and recorded in Book 1846, at page 777 at the Office of the Bucks County Clerk.
- 6. The aforesaid IFC mortgage was assigned to IFC by Realty Equities Countrywide, Inc. and IFC has assumed all the obligations of Realty Equities Countrywide, Inc. under said mortgage.
- 7. On or about the 30th day of April 1974, the Buffalo Savings Bank, a New York corporation, was the holder of a first mortgage on the Pennledge Apartments in the reduced amount of \$1,125,991.98 (hereinafter referred to as the first mortgage) which first mortgage was and still is senior and prior to the IFC mortgage.
- 8. On or about the 30th day of April 1974 the reduced principal balance on the IFC mortgage was \$1.495,615.38.
- 9. The IFC mortgage is commonly referred to as a "wrap-around mortgage" and requires IFC or its successors, as mortgagee, to make all payments of principal, interest,

deposits, taxes, water bills, sewer rents, and insurance premiums to the first mortgagee under the terms of the first mortgage, on the dates when due.

- 10. Plaintiff made monthly payments to IFC in full satisfaction of all the mortgagor's obligations under the IFC mortgage and duly performed all other conditions of said mortgage.
- 11. Upon information and belief, on or about the 21st day of October 1974 IFC filed a petition for reorganization under Chapter X of the Bankruptcy Act in the United States District Court, Southern District of New York, which petition was approved on the 23rd day of October 1974. Plaintiff learned of this after it had made the November payment to IFC.
- 12. Notwithstanding due performance on the part of the plaintiff, IFC or its trustee, James Bloor, wrongfully failed to make its November payment of \$12,934.00 and an additional 4% penalty for late payment, totaling \$13,451.36, to the Buffalo Savings Bank or its agents (as first mortgagee) when due. Plaintiff promptly notified IFC and its trustee of its breach of contract at the time the payment to the Buffalo Savings Bank was due, and was specifically informed by IFC and its trustee that it had sent out a check to the Buffalo Savings Bank.
- 13. Plaintiff immediately contacted the Buffalo Savings Bank, through its agents, and was informed that IFC did not send out a check. From November 10 through November 15, IFC and its trustee continually assured plaintiff that the

check had been signed and sent out, notwithstanding repeated denials by the Buffalo Savings Bank that no such check had been received.

- Buffalo Savings Bank informed the plaintiff that unless the November payment was cabled to it within the day, it would declare a default of the first mortgage. IFC and its trustee stated to the plaintiff that it would not cable the money. Because of IFC's or its trustee's failure to meet its contractual obligations under the IFC mortgage, and because the plaintiff's security had been endangered thereby, the plaintiff was forced to cable \$13,451.36 in November to Buffalo Savings Bank to cure the default.
- 15. The Buffalo Savings Bank, through its agents, has demanded that plaintiff cure the default and demanded that plaintiff make future payments due the Buffalo Savings Bank directly to the agent of the Buffalo Savings Bank.
- 16. IFC and its trustee has failed to give adequate assurances of performance, has failed to render a complete accounting of all monies received from the plaintiff and has failed to return the plaintiff's November payment made to IFC in November.
- 17. Upon information and belief, the defendant trustee of IFC has defaulted in its obligations under the IFC mortgage in the following respects:
 - A. It has failed to make monthly payments to the first mortgagee when due.

- B. It has failed to pay penalty charges for late payments to the first mortgagee.
- C. It has failed to provide adequate assurances of performance to the plaintiff.
- D. It has failed to render a satisfactory accounting to the plaintiff.
- E. It has become insolvent and cannot meet its obligations under the IFC mortgage, nor can it safeguard plaintiff's escrow funds.
- F. It has caused the plaintiff's security in the first mortgage to become endangered and has increased the possibility that the first mortgage will be foreclosed.
- G. It has called in to question the entire contractual relationship between the plaintiff and the defendant IFC.
- of the defendant trustee of IFC, the plaintiff is unable to sell or offer to sell the apartments free from possible foreclosure, believes that it may be subject to the hazard of legal proceedings and perhaps to claims for damages; and is without any remedy at law or in equity unless this court, by its judgment, declares the rights of the plaintiff and the defendants with respect to the IFC mortgage.

WHEREFORE, the plaintiff demands judgment that this court declare and determine this controversy as follows:

- A. That the court declare that the Buffalo Savings Bank now holds a first mortgage in the reduced principal amount of \$1,125,991.98 as of April 30, 1974;
- B. That the court declare that the defendant trustee of IFC holds a second, subordinate mortgage in the reduced amount of \$369,623. as of April 30, 1974;
- C. That this court declare that the trustee of IFC was in default under the IFC mortgage;
- D. That this court declare that plaintiff may make interest and principal payments on the reduced principal amount of the IFC mortgage to the trustee of IFC in accordance with the interest terms of the original bond secured thereby, and that the total payments made to the trustee of IFC not exceed the gross amount of payments otherwise due under the original IFC mortgage after taking into account amounts required to be paid to the holder of the first mortgage.
- E. That the court reform and re-cast the IFC mortgage in accordance with the foregoing.
- F. That this court issue such mandatory and prohibitory injunctions, orders and decrees as is necessary to carry out the aforesaid permanently and during the pendency of this action.
- G. That this court grant the plaintiff such other, further and different relief as may seem just and proper, together with the costs and disbursements of this action.

DATED: May 14, 1975

DENNIS G. KATZ Attorney for Plaintiff 300 N. Main St. Spring Valley, New York 10977 914-356-2525 STATE OF NEW YORK, COUNTY OF ROCKLAND SS.:

Emil Tauber being duly sworn, deposes and says:

deponent is a partner of the plaintiff in the within action;

deponent has read the foregoing complaint and knows the

contents thereof; the same is true to deponent's own knowledge,

except as to the matters therein stated to be alleged on

information and belief, and as to those matters deponent

believes it to be true.

S/ Emil Tauber Emil Tauber

Sworn to before me on

May 14, 1975.

Dennis G. Katz Notary Public, State of New York No. 4513573 Qualified in Westchester County Commission Expires March 30, 1977 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

OF

INVESTORS FUNDING CORPORATION OF NEW YORK, I F C COLLATERAL CORPORATION, et al,

Debtors.

In Proceedings for the Reorganization of Corporations Under Chapter X of the Bankruptcy Act

Nos. 74 B 1454, 1455 and 74 B 1511 -74 B 1542 inclusive

DBB

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE FIXING HEARING DATE ON TRUSTEE'S APPLICATION FOR AN ORDER (A) ENJOINING AND STAYING COMMENCEMENT OR CONTINUATION OF ANY SUITS AGAINST TRUSTEE BY JAYTEE-PENNDEL COMPANY. (B) AUTHORIZING TRUSTEE TO COMMENCE FORECLOSURE SUIT, (C) AUTHORIZING EMPLOYMENT OF SPECIAL COUNSEL THEREFOR, AND (D) REQUIRING JAYTEE-PENNDEL TO RAISE IN SUCH FORECLOSURE SUIT ALL ITS CLAIMS OR DEFENSES

Upon the annexed application of James Bloor, as
Reorganization Trustee of the above-named debtors, dated
August 12, 1975, and the annexed affidavit of Robert Valimont,
a member of the firm of Power, Bowen & Valimont, dated August 6,
1975, and no adverse interest having been represented, and
sufficient cause appearing therefor, it is

ORDERED, that all interested parties show cause before this Court in Room 1505 of the United States Courthouse, Foley Square, New York, New York on the 8th day of September, 1975, at 2:30 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, WHY: (a) Jaytee-Penndel Company ("Jaytee-Penndel") and its attorneys should not be enjoined and stayed from the commencement or continuation of

any pending or contemplated suits, actions or proceedings against the Trustee; (b) the Trustee should not be authorized to commence a foreclosure suit in Pennsylvania against Jaytee-Penndel; (c) the Trustee should not be authorized to employ and appoint the firm of Power, Bowen & Valimont, as special counsel therefor; (d) Jaytee-Penndel should not be required to raise in the Pennsylvania foreclosure proceedings any claims or defenses Jaytee-Penndel may have against the Trustee or any of the above-named debtors; and (e) this Court should not grant to the Trustee such other and further relief as may be just and proper under the circumstances; and it is further

ORDERED, that pending a hearing on the aforesaid application, Jaytee-Penndel and its attorneys, servants, agents and employees be, and they hereby are, restrained and enjoined from continuing the prosecution of the suit against the Trustee now pending in the Supreme Court of the State of New York, County of Rockland, as more fully described in the application; and it is further

ORDERED, that the security provision of Fed. R. Civ. P. 65(c), be and it hereby is, waived, and it is further

ORDERED, that service of a copy of this Order and the application upon which it is based, upon the Securities and Exchange Commission, 26 Federal Plaza, New York, New York; The Chase Manhattan Bank, N.A., c/o Milbank, Tweed, Hadley & McCloy, One Chase Manhattan Plaza, New York, New York; The

United States Trust Company, c/o Carter, Ledyard & Nilburn, Two Wall Street, New York, New York; Republic National Life Insurance Company, c/o Winer, Neuburger & Sive, 425 Park Avenue, New York, New York; the debtors, c/o Levin & Weintraub, 225 Broadway, New York, New York; the IFC Debentureholders' Protective Committee, c/o Kronish, Lieb, Shainswit, Weiner & Hellman, 1345 Avenue of the Americas, New York, New York; and Jaytee-Penndel, c/o Dennis G. Katz, Esq., 300 North Main Street, Spring Valley, New York, in person or by certified mail, return receipt requested, made on or before August 15, 1975 at 5 p.m., shall be deemed good and sufficient service hereof.

Dated: New York, New York August 13, 1975 at 12:30 p.m.

> S/ Dudley B. Bonsal United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

U.S.District Court Filed Mar 16, 1976 SD of NY

IN THE MATTER

OF

INVESTORS FUNDING CORPORATION OF NEW YORK, I F C COLLATERAL CORPORATION, et al,

Debtors.

In Proceedings for the Reorganization of Corporations Under Chapter X of the Bankruptcy Act
ORDER NO. 184

Nos. 74 B 1454, 1455 and 74 B 1511 -74 B 1542 inclusive

ORDER PERMANENTLY RESTRAINING STATE COURT ACTION AGAINST TRUSTEE BY JAYTEE-PENNDEL COMPANY AND PROVIDING FOR PAYMENT

Jaytee-Penndel Company ("Jaytee' Penndel"), having commenced an action against James Bloor, as Reorganization Trustee of IFC Collateral Corporation, Debtor, (the "Trustee") and Realty Equities Countrywide, Inc. in the Supreme Court of the State of New York, County of Rockland (Index No. 3358/1975) (the State Court Action), for, among other things, declaratory relief in respect of that certain Wraparound Mortgage criginally made on or about the 30th day of April, 1974 between Pennledge Apartment Corp., as Mortgagor, and Realty Equities Countrywide, Inc., as Mortgagee (the "Wraparound Mortgage") in the original principal amount of \$1,543,279.81 affecting premises located at 255 East Lincoln Highway, Penndel (Bucks County), Pennsylvania (the "Property"); and the Trustee having applied to this Court by Application dated August 12, 1975 for, among other things, an order restraining Jaytee-Penndel from prosecuting the State Court Action or any other pending or contemplated suit, action

flerofilm Mar 16 1975

or proceeding against the Trustee, and for other and further relief therein requested (the "Application"); and the Court. by Order to Show Cause dated August 13, 1975 (the "Order to Show Cause") having fixed September 9, 1975 at 2:30 o'clock in the afternoon as the date and time of a hearing upon the Application and having ordered Jaytee-Penndel and all other interested parties to show cause at said hearing why the relief sought in the Application should not be granted; and it appearing to the Court that notice of the aforesaid hearing and service of the Application and the Order to Show Cause were duly and timely made upon Jaytee-Penndel, the Securities and Exchange Commission, The Chase Manhattan Bank, N.A., the United States Trust Company of New York, the Republic National Life Insurance Company, the IFC Debentureholders' Protective Committee and the debtors in the manner required by the Order to Show Cause; and hearings on the Order to Show Cause having been held before the Court on October 20, 1975, January 19. 1976 and February 17, 1976; and after hearing said Trustee. in person, by his representatives and his counsel, Weil, Gotshal & Manges, Alan B. Miller and Neal Schwarzfeld, of counsel, in support of the Application; and after hearing Jaytee-Penndel. by its counsel, in opposition to the Application; and after noting the appearance of The Chase Manhattan Bank, N.A., the Securities and Exchange Commission, the IFC Debentureholders' Protective Committee and the United States Trust Company of New York, as Indenture Trustee, by their respective counsel;

and it appearing to the Court that certain of the relief sought by the Application is in the best interests of the Trustee, the above-named debtors and their estates, creditors and stock-holders; and it further appearing to the Court that the prosecution and continuation of the State Court Action, or any other action or proceeding against the Trustee based upon the facts alleged in the Complaint in the State Court Action and contained in the transcripts of the proceedings had before this Court, should be permanently enjoined and restrained; and sufficient cause appearing to me therefor and due deliberation having been had thereon.

NOW, upon the Application and upon all of the pleadings and proceedings heretofore had herein and the testimony adduced before this Court, it is

ORDERED, that the Application of James Bloor, as Reorganization Trustee, dated August 12, 1975 be, and the same hereby is, granted to the extent set forth below; and it is further

ORDERED, ADJUDGED and DECREED that:

1. Jaytee-Penndel, its attorneys, servants, agents and employees have been, and they hereby are, enjoined, restrained and stayed from continuing the prosecution of the State Court Action and from the commencement or continuation of any contemplated suit, action or proceeding against the Trustee arising out of the facts alleged in the Complaint in the State Court Action or asserted in the proceedings heretofore had before this Court;

- The ownership interest of Jaytee-Penndel in the property is subject to that certain First Mortgage dated November 4, 1965 of which the Buffalo Savings Bank is the Seccessor Mortgagee (the "First Mortgage"), which mortgage is wrapped-in the Wraparound Mortgage. The constant mortgage payments of principal and interest due to the Trustee under the wraparound mortgage are \$11,664.00 (including interest at the rate of 7 3/4% per annum), which amount is inclusive of the constant monthly payments of principal and interest due under the First Mortgage at the rate of \$9,166.67 per month (including interest at the rate of 6% per annum). In addition to the foregoing, there are payments due to the Trustee under the Wraparound Mortgage as deposits for real estate taxes, water rates, sewer rent taxes and insurance premiums at the current rate of \$6.114.50 per month (but which items may vary from time to time depending upon changes in such rates, taxes and premiums), which deposits are inclusive of deposits required to be made under the First Mortgage for real estate taxes only at the rate of \$3,767.33 per month (which taxes may vary in the event of a change in the real estate tax rate) .-
- 3. Commencing upon the first business day following the date of this order and subject to the provisions of Paragraph 8 hereof, Jaytee-Penndel shall pay to the Trustee the payments due under the Wraparound Mortgage by mailing to the Trustee on or before the first business day of each succeeding month by first class mail, postage prepaid, addressed to him

at his office, two checks; one of such checks shall be a check payable to the order of the Buffalo Savings Bank (the "Buffalo check") in the amount of \$9,166.67 plus an amount equal to the amount then required to be deposited with the Buffalo Savings Bank for real estate taxes, as required under the First Mortgage: and a second check payable to the order of the Trustee (the "Trustee's check") for the balance due under the Wraparound Mortgage in the amount of \$2,497.33 plus an amount equal to the deposit required to be made under the Wraparound Mortgage on account of the then water rates, sewer rent taxes and insurance premiums; provided, however, that, in the event that the First Mortgage is paid in full, Jaytee-Penndel shall, commencing with the month following the month in which such mortgage shall be paid in full, pay to the Trustee the sum of \$11,664 per month plus an amount equal to all monthly deposits required to be made under the Wraparound Mortgage for real estate taxes, water rates, sewer rent taxes and insurance premiums at the then current rate for such items.

- 4. The Trustee shall, no later than two business days after receipt of the Buffalo check, mail same to the Buffalo Savings Bank or its designated servicing agent, with a copy of his letter of transmittal to be sent simultaneously to Jaytee-Penndel.
- 5. Upon receipt of the Buffalo check and the Trustee's check described in Paragraph 3 hereof (but subject to collection), the Trustee shall credit all sums so received for the

account of Jaytee-Penndel under the Wraparound Mortgage.

- 6. In the event that Jaytee-Penndel is notified that any Buffalo check has been returned unpaid or dishonored for any reason, it shall advise the Trustee by telephone of such notification at his office in New York City (212 333-4016) and confirm such advice in writing, mailed by first-class mail, postage prepaid, addressed to the Trustee at his office, 630 Fifth Avenue, New York, New York 10020 (or such other place at which his office may then be located) within one (1) business day after the receipt by Jaytee-Penndel of such notice of non-payment or dishonor.
- 7. Other than as herein specifically ordered, the terms of the First Mortgage and the Wraparound Mortgage shall continue in full force and effect.
- 8. The provisions of Paragraph 2 through 7 hereof shall remain in effect only so long as Jaytee-Penndel is the owner of such property and the Trustee is the holder of the Wraparound Mortgage.
- 9. Jaytee-Penndel shall, within five days from the receipt of a certified copy of this order, transmit same, or a copy thereof, to each of the Buffalo Savings Bank, 545 Main Street, Buffalo, New York, and to Fidelity Bond & Mortgage Company (its mortgage serving agent), Southeast corner 16th and Walnut Streets, Philadelphia, Pennsylvania 19102 by certified mail, return receipt requested, together with a letter instructing such bank and its servicing agent that Jaytee-Penndel requests that each of them accept the Buffalo checks from the

Trustee. Copies of such letters and the proofs of receipt of such letters shall be filed promptly with this Court and served upon counsel for the Trustee.

- Jaytee-Penndel or its counsel shall receive a copy of this order, it shall pay to the Trustee by cashier's or certified check an amount equal to the difference between a) all payments of interest and amortization due under the Wraparound Mortgage since November 1, 1974 and b) the sum of all payments made since that date by Jaytee-Penndel to the Buffalo Savings Bank or its servicing agent on account of interest, amortization and late charges on the First Mortgage and the payment made to IFC Collateral Corporation on or about November 1, 1974; plus the amount of the late charges due to the Trustee on account of such difference, all as computed on Exhibit A annexed to this order.
- ll. Jaytee-Penndel shall provide to the Trustee, within seven days after receipt of a copy of this order, a statement under oath as to the amount of all payments which Jaytee-Penndel has made since November 1, 1974 on account of real estate taxes, water rates, sewer rent taxes and insurance premiums, which statement also shall indicate the name and address of the person or persons with whom such deposits have been made or to whom such amounts have been paid. In addition to the amounts required to be paid by Jaytee-Penndel by Paragraph 3 hereof, Jaytee-Penndel shall deposit with the Trustee an amount equal

to the difference between the amount of the deposits for the aforesaid items required to be made under the Wraparound Mortgage and the amount reflected in the sworn statement referred to herein, payment to be made within seven days from the receipt of a copy of this order by Jaytee-Penndel so as to restore the deposit account of the Trustee to the amount required under the Wraparound Mortgage.

- 12. The entry of this order is without prejudice to the right of the Trustee and Jaytee-Penndel to apply to this Court for further relief on account of any damages, costs and expenses, including attorneys' fees, which either of them may allege that they have sustained as a result of the facts alleged in the Complaint in the State Court Action, the Application or in the proceedings heretofore held before this Court. In the event that either party makes such application, it shall be referred to The Honorable John J. Galgay, Bankruptcy Judge, as Special Master, to hear and report to this Court.
- 13. A certified copy of this order may, but need not, be filed by the Trustee or Jaytee-Penndel in the Recorder's Office of Bucks County, Pennsylvania.

DATED: NEW YORK, NEW YORK March 15, 1976

> S/ DUDLEY B. BONSAL United States District Judge

A True Copy Raymond F. Burghardt, Clerk

By S/ Deputy Clerk Monthly interest and amortization payments due to the Trustee under the Wraparound Mortgage are \$11,664.00 per month. The payments from November 1, 1974 thru February 1, 1976 total 16 payments or 16 x \$11,664.00

\$186,624.00

Plus late charges for 15 months only on the net amount that would be retained by the Trustee after payment to the Buffalo Savings Bank

2.247.60 \$188.871.60

Less amounts paid by Jaytee-Penndel directly to Buffalo Savings Bank for 16 months x \$9,166.67 per month

\$146,666.72

Less one month's late charges paid by Jaytee-Penndel to Buffalo Savings Bank

517.36

Less \$11,664.00 paid by Jaytee-Penndel to Trustee in November, 1974

11,664.00 158.848.08

Due Trustee through February 1, 1976 payment

30,023.52

IF PAYMENT FOR MARCH 1, 1976 NOT MADE TO TRUSTEE ADD \$2,497.33 PLUS LATE CHARGE OF \$149.84 or

7.647.17 2.647.17 32.670.69 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

OF

INVESTORS FUNDING CORPORATION OF NEW YORK, I F C COLLATERAL CORPORACTION, et al,

DATED: March 30, 1976

1

Debtors.

In Proceedings for the Reorganization of Corporations Under Chapter X of the Bankruptcy Act

NOTICE OF APPEAL

Nos. 74 B 1454, 1455 and 74 B 1511 -74 B 1542 inclusive

NOTICE OF APPEAL BY JAYTEE-PENNDEL COMPANY SIRS:

NOTICE IS HEREBY GIVEN that Jaytee-Penndel Company hereby appeals to the United States Court of Appeals for the Second Circuit from a final order and judgment premanently restraining a pending state court action against James Bloor, as Reorganization Trustee of IFC Collateral Corporation, Debtor, and providing for payment, which was issued by The Hon. Dudley B. Bonsal, U.S.D.J., on March 15, 1976 and filed with the Clerk of the United States District for the Southern District of New York on March 16, 1976.

DENNIS G. KATZ, P.C. Attorney for Jaytee-Penndel 300 N. Main St. Spring Valley, N.Y. 10977 914 356 2525

By S/ Dennis G. Katz Dennis G. Katz, Esq. TO: WEIL, GOTSHAL & MANGES
Attorneys for James Bloor.
as Trustee
767 Fifth Avenue
New York, New York

LEVIN & WEINTRAUB Attorneys for Debtors 225 Broadway New York, New York 10007

MILBANK, TWEED, HADLEY & McCLOY Attorneys for The Chase Manhattan Bank, N.A. One Chase Manhattan Plaza New York, New York 10005

CARTER, LEDYARD & MILBURN Attorneys for United States Trust Company of New York 2 Wall Street New York, New York 10005

SECURITIES & EXCHANGE COMMISSION 26 Federal Plaza New York, New York 10007

WINER, NEUBURGER & SIVE
Attorneys for Republic National
Life Insurance Company
425 Park Avenue
New York, New York 10022

KRONISH, LIEB, SHAINSWIT,
WEINER & HELLMAN
Attorneys for IFC Debentureholders'
Protective Committee
1345 Avenue of the Americas
New York, New York 10019

1	UNITED STATES DISTRICT COURT
2	SOUTHERN DISTRICT OF NEW YORK
3	x
4	In the Matter :
5	of : 74 B 1454
6	INVESTORS FUNDING CORPORATION, :
7	et al. :
8	x
9	February 17, 1976, 2:30 P.M.
10	Before:
11	Hon. Dudley Bonsal,
12	District Judge.
13	Appearances:
14	JAMES BLOOR, ESQ., Trustee.
15	MS. PRUDENCE ABRAM,
10	ALAN MILLER, ESQ., NEAL SCHWARTZFELD, ESQ.,
16	Attorneys for Trustee.
17	DON HORWITZ, ESQ.,
18	Attorney for the SEC.
19	ROBERT HAFT, ESQ., Attorney for Debenture Holders.
20	
	ARTHUR KIRKLAND, ESQ., Attorney for Chase Manhattan Bank.
21	
22	MICHAEL BRODY, ESQ., Attorney for Equitable Life Assurance Company.
23	DENNIS KATZ, ESQ.,
24	Attorney for Jay Tee Penndel.
05	RAYMOND RUBY, ESQ.,
25	Attorney for 176 East 71st Street Corp.

lhh

make the final stab if there is anything in that. I think that is the answer to that. I think your point is well taken. I think we will follow that.

MS. ABRAM: I believe the next matter on your calendar is the application respecting Jay Tee Penndel.

THE COURT: That's my friend Mr. Katz.

MS. ABRAM: Is that the next matter on your calendar?

THE COURT: It is on mine. Join and stay commencement or continuation of any suits against the trustee by Jay Tee Penndel, is that the one? I see despite my best suggestion, you are still writing letters to each other I see here. What's the story today on this one?

MR. SCHWARTZFELD: Your Honor, since we were last here we have again endeavored to resolve this dispute without once again troubling the court, again on the basis that the court had suggested at our last appearance, which was that we work out a mechanism for sending of two checks and the like. Your Honor is familiar with this.

THE COURT: I know there was a problem of attorney's fees for Mr. Katz, and now you are talking about some other attorney's fees.

MR. SCHWARTZFELD: A dispute arose. I prepared a form of order and sent it to Mr. Katz. That form of

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order contains a provision to the effect that both sides,

Mr. Katz and his client and the trustee, can, if they so

desire, make application for attorney's fees and damages

and the like. Mr. Katz balked at this provision. He felt

it was inappropriate for the trustee to even ask for the

recovery of attorney's fees and/or damages, and that only

his client should be permitted to so ask.

THE COURT: That doesn't seem right to me. Why isn't this a two-way street? You say you suffered all the damage, but somebody has to decide that, I suppose.

MR. KATZ: Your Honor, again I apologize that the trustee breached its contract and started this whole thing.

THE COURT: This all goes back to this problem last October, and I am afraid I can't fault the trustee. He was a pretty busy fellow when it came in, and I can't fault him for all that. I'm sorry if it caused a hardship to your client, although I don't think it caused terribly much. I would still like to regularize it from here on out instead of fussing about all that.

MR. KATZ: It is my client's wish that the matter of attorney's fees and everything else can go to a state court, which we have commenced an action, would like to settle the issue there and not in the Bankruptcy Court.

1hh

THE COURT: I don't know about that. You don't like coming to New York, being out there in Spring Valley. That's your problem.

MR. KATZ: That's correct, your Honor.

THE COURT: I don't see that. What I would like you to do, I think, gentlemen, is to work out, as I recall it the arrangement was to work out the matter of service so that we wouldn't get caught in any future problems here, wasn't it, and we talked about that and the two checks, and why can't that be done?

MR. KATZ: Your Honor, I think it is a matter of just not being able to come together on the essential terms of the entire agreement.

THE COURT: No, no. I am afraid I can't, Mr.

Katz, much as I would like to be helpful in every way,

there are certain limits beyond which I can't go. I would

still like you to see here and now an arrangement so that

you and the trustee are satisfied that the service is

going to be paid and that the amounts of these various

instruments are going to be paid, and if there is anything

else that has to be done, then that would have to be a

separate matter and a matter for application.

MR. KATZ: Let me state that there is no issue about the first mortgage being paid. We have continually

1 lhh 50 kept the first mortgage and escrow and taxes and water, 2 sewer charges, 100 percent current, so there is no diffi-3 culty with infringing on the second mortgage's position. 4 In addition, as I have --5 6 THE COURT: As I recall it, we have a wrap around, 7 don't we here? MR. SCHWAR. ZFELD: That's correct. 9 THE COURT: Why don't we live up to the terms 10 of it? MR. KATZ: We feel that because of a very 11 substantial breach in the terms of the wrap around--12 THE COURT: That's the one you were talking 13 14 about last October or a year ago --15 MR. KATZ: And continuing. I don't think I mentioned the last time I was here that we had given about 16 17 an \$18,000 payment to the trustee to forward on to the 18 first mortgage. The first mortgagee refused to accept the payment and continues to refuse to accept it. In 19 20 addition, they have not returned to us--21 THE COURT: Who is the first mortgagee? MR. KATZ: The Buffalo Savings Bank. In addition, the trustee has refused to return to us the amount 23 that was supposed to have been forwarded to the Buffalo

Savings Bank, and they still have retained it. So there is

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Penndel Borough in Pennsylvania?

A I am. I have never physically seen them, but I am very familiar with the property.

Ω Is that the property owned by Jay Tee Penndel Company?

A Yes.

Q Is Jay Tee Penndel Company's ownership of that property subject to certain mortgages?

A It is.

Q Would you describe briefly for the court the first mortgage?

A There is a first mortgage held by the Buffalo Savings Bank in the original principal amount of \$1,375,000, which was put on the property on November 4, 1965, which is payable \$9,166.67 per month constant, including interest at 6 percent per annum, and that mortgage matures January 1, 1987, and has a present principal balance of approximately \$1,044,000.

Q What is the interest rate on that?

A 6 percent per annum.

Q Is the property also subject to a wrap around mortgage?

A The property is subject to a wrap around mortgage presently held by the trustee. That mortgage is dated

June 29, 1972, which was the time it was created, and it is in the principal amount of one million -- original principal amount of \$1,543,000, approximately. That mortgage was purchased by IFC Collateral Corporation in 1972 and it has been on record ever since. That mortgage is payable \$11,664 per month, including interest at 7-3/4 percent per annum and matures June 1, 1972, and that mortgage was on record and the present owners, Jay Tee Penndel, took subject to all the terms of that mortgage when they acquired the property in April of 1974.

Q Prior to November of 1974, had there been any problem in the making of payments to Buffalo Savings Bank or to IFC Collateral?

A No, sir.

Q Would you describe the events that took place in November of 1974 with respect to the payment on the wrap around mortgage and the first mortgage?

A It is the obligation of the wrap around mortgagee to pay the interest and amortization on the Buffalo Savings Bank mortgage. Mr. Bloor became trustee the end of October, 1974- beginning of November, 1974. I think it has been described here before probably, a chaotic state that the company was in at that time, and although the payment was made by Jay Tee Penndel, the records of payment, was not

FOLEY SQUARE, NEW YORK, NY. - 791-1020

2 made by the trustee --

THE COURT: Until when? When was it paid?

THE WITNESS: It was paid alter in November.

THE COURT: November 18th, is that right?

Buffalo Savings Bank and the Buffalo Savings Bank returned it to us saying that the payment had been made by Jay Tee Penndel, and as I recall the letter, that they had been instructed by Jay Tee Penndel that the payments were hereafter to be made by Jay Tee Penndel and not to be accepted from the trustee. We thereupon sent back to the Buffalo Savings Bank an equivalent amount and said "Apply it on the December payment." Similarly Buffalo returned that payment. The difference between the amount we paid Buffalo and the amount we were to have received has never been paid by Jay Tee Penndel, and if you want I can give you the amount that's due us at this time and remains unpaid.

Q Please do so.

A The amount that we would have netted if the payments were made and we were -- then had the funds to pay Buffalo, which we didn't have because we weren't being paid by Jay Tee Penndel, we would be entitled to receive \$93,957.28.

THE COURT: As of what date, sir?

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THE WITNESS: Through February 1, 1976. The delinquencies by Jay Tee Penndel commenced in October-November, 1974, over 15 months ago. We have given credit to Jay Tee Penndel of the famous payment that Mr. Katz talks about, the \$11,664 which was part of the November payment which it sent us and which we were unable to disgorge to Buffalo because Buffalo wouldn't take it because of their suggestion, giving them a credit for \$11,664 leaves a balance of \$28,293.28. Charging Jay Tee Penndel late charges only on the net amount due us and not on the total payment on which we would be entitled to charge, the late charges were \$2,097.76 making a total of \$30,391.04. In all our negotiations with Jay Tee Penndel we have said "We will give you back the late charges Buffalo charged you of \$517.36." We have always been prepared to do that and are prepared to do that now. It leaves a balance due us of \$29,873.68, none of which we have seen in the whole period of our negotiations with Jay Tee Penndel.

Q Mr. Sheiner, are you familiar with the complaint brought on behalf of Jay Tee Penndel Company in the Rockland County Court, which is Exhibit No. 2 I believe to the trustee's application?

A Yes, I am.

That complaint calls for, does it not, the forming

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and casting of the terms of the wrap around mortgage?

That complaint seeks to do that situation.

What would be the effect of such a division of the wrap around mortgage?

When we got the proposal, we analyzed it. We were absolutely shocked by the nature of the proposal because the wrap around mortgage bears interest at 7-3/4 percent per annum. We pay interest to Buffalo on its unpaid balance of approximately \$1,043,000. If Mr. Katz and Mr. Tauber's proposal was accepted, and it seemed to us that it was clear what they intended, we would have lost interest on over \$1,000,000 at the rate of 1-3/4percent per annum or approximately 18 or 19 thousand dollars per year. That wasn't all. The Buffalo mortgages amortizes at the rate of approximately \$28,000 per annum more than the wrap around, so that our equity in the wrap around increases at the rate of \$24,000 a year, so if you take the \$24,000 and the \$18,000 interest, we would have been deprived of \$42,000 a year. That was for indiscretion, if you want to call it that, of not making a payment in the chaotic period and trying to right that thing immediately, but impossible to do it, and that's why we have been at this for 15-odd months with files almost six inches high.

There have been attempts, I take it, then, to Q

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Sheiner-direct cross

settle this dispute with Jay Tee Penndel Company, have there not?

A There absolutely have been. We have offered to give away rights which we hold under our wrap around mortgage in an effort to settle what we think in negotiations with anyone else would have been settled more than 14 months ago. We have offered to have them send us a check made payable to Buffalo which the trust e would immediately transmit to Buffalo. We have offered that they send the difference to us. We have agreed to say that this arrangement would be applicable until further order of the court, even though there is nothing in the wrap around mortgage and nothing in the law as far as I know that would require us to give this relief so called.

THE COURT: There isn't?

THE WITNESS: For the mortgagor. It has just taken a tremendous amount of everybody's time in the office, and it shouldn't be. We would be glad to continue to negotiate with the mortgagor.

THE COURT: Mr. Katz, do you have any questions you would like to ask the witness?

MR. KATZ: Yes, I would.

CROSS EXAMINATION

BY MR. KATZ:

Q Mr. Sheiner, you made an allegation that there was a written correspondence you received from Buffalo which stated that my client instructed them not to make--not to accept payments from your office. Could you produce that piece of correspondence?

A I will look for it in my files.

MR. SCHWARTZFELD: Your Honor, I have here in front of me an additional letter, this is from the lawyers for Buffalo Savings Bank to Mr. Sheiner, which I would be happy to have marked.

MR. KATZ: I'd just like to see this.

THE COURT: What's the date of that?

MR. SCHWARTZFELD: June 25, 1975, your Honor.

If I may read one sentence from it, this, as I say, is
from a law firm in Philadelphia, counsel to Buffalo Savings
Bank, to Mr. Sheiner. To put it in context, it says "I am
returning herewith a check in the amount of \$12,000,"

with respect to the mortgage on the Pennledge Gardens
property. The last sentence of the first paragraph reads,
"We have been advised by the record owner of the property
that it will make the mortgage payments directly to
Fidelity Bond and Mortgage Company and instruct it not to
accept your checks."

THE WITNESS: That's a letter I wrote this summer.

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(Trustee's Exhibit 1 was marked for identification.)

THE COURT: Why does Buffalo have a Philadelphia lawyer?

MR. SCHWARTZFELD: I suspect it is because the property is located in Pennsylvania and because--

MR. MILLER: The mortgage servicing agent for the Buffalo Savings Bank is a Philadelphia bank, your Honor. The letter is from the law firm of Drinker, Biddle & Reath in Philadelphia.

MR. KATZ: For the record, your Honor, I don't like to quibble about English here, I am very surprised that any agent of Buffalo would say that my client instructed them not to accept payment. All I can say is that it says here "And instructed not to accept checks." I don't know whether he means we have been instructed or that Jay Tee Penndel instructed. I really don't -- I know for a fact that it is not the case that Jay Tee Penndel instructed anybody not to accept payments, and I certainly assure the court that my client has no relationship with Buffalo Savings Bank which would entitled it to give instructions to a bank in Buffalo with respect to a mortgage. I do not read the letter the same way the trustees do.

MR. SCHWARTZ: I think the letter from Drinker,

Biddle & Reath speaks for itself as to what was instructed and to whom.

THE WITNESS: Might I add one more thing?

MR. KATZ: May I?

THE COURT: Mr. Katz, there is a lot of smoke in all this, and it is very disturbing, and we do waste a colossal amount of time, I am sorry you keep coming into New York on this matter, but it seems to me what I would like to have somebody, and I don't care whether it is you or your client, somebody write a letter to the Buffalo Savings Bank and tell them of the arrangement this gentleman has testified to and get that over with. The Buffalo Savings Bank is the absent guest here. I think I would like that to be done. What about the money that you owe to the trustee or your client owes to the trustee?

MR. KATZ: I was going to ask the witness if my client has offered to pay the difference. I was going to ask the witness--

THE COURT: You can ask him that.

BY MR. KATZ:

Q Could you tell me what the difference is between the amount required under the first mortgage and the amount required to be paid to you?

A The amount that was unpaid to us as I indicated--

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the future.

I remember now. You said he would be willing to

month in the past and is willing to make the payments in

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Sheiner-cross

do it, provided he split the mortgage.

rights in the foreclosure proceeding.

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No, that is not correct. I am glad you were confused about that because at least it is getting into the open now. My client -- this is for the record for the benefit of the court, your Honor. My client was willing to pay \$2,497 each month starting from some time in December, is willing to make 2,497 in the future and has been willing all this time to turn over the net sum, but it has not been accepted by the trustee for the reason that they wish to

foreclose in Pennsylvania, they have asked this court

for permission, and they do not want to prejudice their

MR. MILLER: Let the record be encumbered by counsel's testimony, your Honor, we will be delighted to take a check for the full amount that is due us. We would be delighted to have the wrap around mortgage continued ad infinitum, we would be happy to go home today and leave matters the way they stand. I am asking Mr. Katz if that is what the proposal on the table is today, a check for all our arrears, less the \$500 late charge, and leave the wrap around mortgage in its present form or as his Honor has suggested by the vehicle of the two checks. We would be delighted, your Honor. We would have gone home weeks or months ago. But I don't believe that is Mr. Katz's proposal

at all.

MR. KATZ: That is the proposal, not with prejudice to our continuing the state court proceeding.

ing. I have got to clean this up. I gather that proposal is to be done, and why don't you just agree on that proposal and make the payments. I don't know anything about the state court proceeding. I know the situation here and I know that it is the duty — it is my duty as it is the trustee's and all these gentlemen here to protect the people who are interested in this estate, and we are going to protect them. I assure you of that. I think you are just mixing apples and oranges here, Mr. Katz. I feel very strongly. The first thing is to regularize the situation with the wrap around mortgage. I am not going to get involved in other things at all.

MR. KATZ: Your Honor, with all respect, the issue here is the right of the trustee to permanently enjoin my client from exercising a right guaranteed or provided for under federal statutes.

THE COURT: You worry about that.

MR. KATZ: This is what my client has been opposing.

THE COURT: Have you any more questions you

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alleged that the remedy is very drastic and may lose a

lot of money, it is a very serious remedy, and to be frank,

of law how the federal Bankruptcy Court would be embarrassed

I agree with that. But they have never said as a matter

by the state court, except to say that the trustee may be embarrassed because he may come out on the short end of the deal.

THE COURT: This is this action to reform the mortgage?

MR. KATZ: This is an action for a declaratory judgment, it is an action for broad ranging equitable remedies, including reformation.

THE COURT: That's not going to be in that court.

If there is going to be any reform, it is going to be done

right here and I am going to supervise it. I haven't any

problem about that at all.

MR. KATZ: I think I did indicate last time that there was an intention to amend the complaint to seek monetary damages and attorneys' fees, although we did not bring that action initially.

background confusion here, but I think you gentlemen ought to formalize this deal that I think you have agreed to here. So far as I am concerned, the wrap around mortgage speaks for itself, but I have, and I did that because I thought it was appropriate and because of the difficulty they had originally, I provided for the two checks. As I understand it what would happen would be that the check that went to

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the Buffalo Savings Bank with a transmittal letter,
a copy of that letter would go to you so you would know
it had been paid. I think we ought to do that and I
think the rest of the amounts due the estate ought to be
paid, pronto.

THE WITNESS: May I make a comment? If your Honor please, I think that the relief that's requested by the trustee should be granted and then we would be glad to sit down with Mr. Katz and work out anything reasonable within our rights. Until that time --

MR. MILLER: Your Honor, is it your desire that we settle an order to the effect of what your Honor summarized a few minutes ago?

THE COURT: Yes, that's what I would like to do.

Is there any reason why we can't do that?

MR. MILLER: I see not.

MR. KATZ: Your Honor, I respectfully point out to the court--

THE COURT: I know you do.

MR. KATZ: That might client cannot consent to such an order.

THE COURT: All right, he doesn't consent. I will settle it, and you want to set up an order, a counter order, you can do that, setting forth what you think, and

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I will decide which order to sign. I will do that on the basis of the record right here today.

MR. MILLER: I think we will have to do that, your Honor. We have tried to get together, but we haven't been able to.

MR. BLOOR: Your Honor, I was going to suggest that in order to give us some sort of leverage, that you authorize me to retain Pennsylvania counsel in order to bring about a foreclosure of the property if your order is not obeyed.

THE COURT: That's right. All right.

MR. MILLER: We will give that some thought in preparing the order, but I think the contempt provisions will more than suffice, Mr. Bloor.

THE COURT: As I say, I don't like to go into all these other areas, but if we have to go into them, we will go into them. The main thing is to see that the estate is protected.

MR. KATZ: With respect to my client's rights, your Honor, I would ask that if you are entertaining such an application, that you give my client an adequate opportunity to oppose --

THE COURT: No, he will settle the order on you, and if you want to submit a counter order with a memorandum

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as to why you want it, you can submit it.

MR. MILLER: We will be happy to settle it on a day or two notice. It has to go to Rockland County. We will give the gentleman all the courtesies to which he is entitled.

THE COURT: Sure. All right.

(Witness excused.)

THE COURT: Is there an application of the First National City Bank here?

MS. ABRAM: Your Honor, this is an application by the First National City Bank. Mr. Loren Lavine represents First National City Bank is here. The application is seeking leave to foreclose or to join Mr. Bloor and/or 17 East 57th Street Realty Corporation ir a foreclosure proceeding with respect to property located in 417 East 57th Street. The trustee has not opposed this -does not oppose this application on certin conditions. I would like to state the history of this situation briefly for your Honor so that you might understand the trustee's position. In October of 1975 the trustee sought to reconvey title to this property to BBO Construction, Inc., in exchange for obtaining releases from Christopher Boomis and BBO Construction, Inc., for any liability pursuant to the transactions pursuant to which the debtor corporation had

STATE OF NEW YORK COUNTY OF ROCKLAND SS:

Dennis G. Katz, an attorney duly admitted to practice before the courts of the state of New York and the U.S. Court of Appeals, Second Circuit, hereby affirms that the following statements are true:

On the 29th day of June 1976 I served a copy of the within APPELLANT's BRIEF upon Weil, Gotshal & Manges, Esqs., attorneys for the appellee, a their office at 767 Fifth Avenue, New York, New York 10022 (the address designatred by said attorneys) by depositing same enclosed in a postpaid property addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dennis G/ Katz

DULY AFFIRMS THIS 29th DAY OF JUNE 1976

*and appendix